

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

ROBERT HARDEN,

Petitioner,

vs.

STATE OF NEBRASKA, DOUG  
PETERSON, Attorney General; SCOTT  
FRAKES, Director of the Nebraska  
Department of Corrections; and TODD  
WASMER, Warden of Tecumseh States  
Correctional Institute;

Respondents.

**8:19CV492**

**MEMORANDUM AND ORDER**

This matter is before the court on initial review of Petitioner Robert Harden's Petition for Writ of Habeas Corpus ([filing no. 1](#)) brought pursuant to [28 U.S.C. § 2254](#). The court will dismiss the petition because it is a second or successive habeas corpus petition that has not been authorized by the Eighth Circuit Court of Appeals.

The statutory prohibition against successive petitions by state prisoners is codified in [28 U.S.C. § 2244](#), which provides in relevant part:

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

28 U.S.C. § 2244(b).

In *Magwood v. Patterson*, 561 U.S. 320, 332-33 (2010), the United States Supreme Court held that “the phrase ‘second or successive’ must be interpreted with respect to the judgment challenged.” In other words, the phrase “second or successive” applies to entire habeas petitions, and not to individual claims in those petitions. *Id.*

This court’s records reflect that Harden’s petition is successive. He challenges his 2006 conviction in the District Court of Douglas County, Nebraska for one count of criminal conspiracy to commit first degree murder. Harden unsuccessfully challenged this same conviction in earlier federal habeas corpus litigation. *See Harden v. Gage et al.*, Case No. 8:13CV356 (D.Neb.) ([Filing No. 33](#), Sept. 2, 2014 Memorandum and Order dismissing petition with prejudice as barred by the one-year limitations period). Thus, Harden would be required to seek

the permission of the Eighth Circuit Court of Appeals to commence this second action. [28 U.S.C. § 2444\(b\)\(2\) & \(3\)\(A\)](#). He has not done so,<sup>1</sup> and this matter must be dismissed. *Burton v. Stewart*, 549 U.S. 147, 152 (2007) (the district court lacked jurisdiction to entertain habeas petition since prisoner did not obtain an order authorizing him to file second petition).

Lastly, a petitioner cannot appeal an adverse ruling on a petition for writ of habeas corpus under § 2254 unless granted a certificate of appealability. [28 U.S.C. § 2253\(c\)\(1\)](#); [Fed. R. App. P. 22\(b\)\(1\)](#). A certificate of appealability cannot be granted unless the petitioner “has made a substantial showing of the denial of a constitutional right.” [28 U.S.C. § 2253\(c\)\(2\)](#). To make such a showing, “[t]he petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. Daniel*, 529 U.S. 473, 484 (2000).

In this case, Petitioner has failed to make a substantial showing of the denial of a constitutional right. The court is not persuaded that the issues raised in the petition are debatable among reasonable jurists, that a court could resolve the issues differently, or that the issues deserve further proceedings. Accordingly, the court will not issue a certificate of appealability in this case.

IT IS THEREFORE ORDERED that the habeas corpus petition ([filing no. 1](#)) is dismissed without prejudice to reassertion upon certification by the Eighth Circuit Court of Appeals. No certificate of appealability has been or will be issued in this matter. The court will enter judgment by separate document.

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<sup>1</sup> The court notes that, after Harden filed his present petition, the Eighth Circuit Court of Appeals denied his motion for authorization to file a successive habeas application in the district court on January 24, 2020. (See [Filing No. 45](#), Case No. 8:13CV356.)

Dated this 18th day of May, 2020.

BY THE COURT:

A handwritten signature in blue ink that reads "Richard G. Kopf". The signature is written in a cursive style with a large, stylized "R" and "K".

Richard G. Kopf  
Senior United States District Judge